Nos. 84-237, 84-238, 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, et al.,

Appellants,

v.

BETTY-LOUISE FELTON, et al.,

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,

Appellant,

v.

BETTY-LOUISE FELTON, et al.,

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellant,

v.

BETTY-LOUISE FELTON, et al.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

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QUESTION PRESENTED

Whether the plan or program formulated by the New York City Board of Education with funds made available under Title I of the Elementary and Secondary Education Act of 1965 violates the Establishment Clause insofar as it uses such funds to provide teachers and clinical and guidance personnel who are public employees to teach remedial educational courses and to perform supporting services on the premises of church schools for the benefit of the students attending those schools?

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COUNTERSTATEMENT OF THE CASE

1. *Introduction*

(a) This counterstatement is based primarily on (1) Defendants' (Appellants') Joint Statement of Material Facts Not in Dispute, submitted to the District Court in connection with appellants' cross-motion for summary judgment (JA 26-73); (2) excerpts from the Evaluation Reports on the various parts of the New York City Title I program for the year 1979-80, prepared at the direction of the New York City Board of Education, and

submitted to the District Court in support of appellants' cross-motion for summary judgment (JA 237-250); and (c) the affidavits of Reverend Monsignor John J. Healy, Secretary of Education and Director of the Roman Catholic Archdiocese of New York, and Reverend Vincent D. Breen, Superintendent of the Roman Catholic Diocese of Brooklyn, which affidavits were also submitted in support of appellants' cross-motion for summary judgment (JA 251-286).

In short, this counterstatement is based on the record in this case as set forth in appellants' documents submitted to the District Court. It is made necessary by the fact that appellants' statements of the facts of record on the present appeals are incomplete, misleading and untrue in critical respects, and, therefore, give the Court an erroneous and distorted view of the program in question, particularly in those aspects that are crucial to the constitutional issue in this case.

2. *The Statute*

Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.* ("Title I")[1] was enacted by Congress in 1965 with the stated policy of providing "financial assistance... to local educational agencies serving areas with concentrations of children from low income areas to expand and improve their educational programs by various means ... which contribute particularly to meeting the special educational needs of educationally deprived children" (JA 27). As defined in the statute, "local educational agency" means a public board of education or other public authority with control over public elementary and secondary schools within a city, town or other political subdivision of a state (*Id.*).

Title I provides for annual appropriations by Congress to support programs approved by local educational agencies, which may include remedial training in reading and mathematics, the teaching of English "as a second language", and special services for the physically handicapped (JA 28). The program in question in this case does not include services for the physically handicapped.

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[1] Replaced, but preserved in all essential features, by the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801-3807.

The statute makes eligible to participate in the programs students (1) who reside in school districts and attendance areas containing a specified concentration of children of families below the poverty level, and (2) who are educationally deprived — i.e., below normal learning levels (*Id.*). Such students are eligible regardless of whether they attend a public or "nonpublic" school, but the statute does not expressly specify whether a program may, and it certainly does not specify that a program must, be administered on the premises of the latter type of school.[2]

3. *The New York City Program*

The local educational agency involved in this case is the New York City Board of Education (JA 27-28). In the program it has formulated ("New York City program"), the funds made available by the federal government are used mainly to pay the salaries of teachers and clinical and guidance counselors who are assigned to teach and provide counseling services in, or on the premises of, "nonpublic" as well as public primary and secondary schools.

(a) *The "Nonpublic" Schools in the Program*

The "nonpublic" schools in the New York City program are virtually all closely associated with a religious organization or faith. Approximately 85% are Roman Catholic parochial schools, and 8% are Hebrew day schools. For that reason, appellees have referred to them as "church-affiliated" or "church" schools, and will do so in this brief.

The religious or sectarian nature of the Roman Catholic schools participating in the program is documented in the previously mentioned affidavit of Reverend Monsignor Healy, the Secretary of Education and Director of the Department of Education of the Roman Catholic Archdiocese of New York (which includes

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[2] Based on statements in the Congressional Record, this Court has previously come to the conclusion that Title I permits, although it does not require, instruction on the premises of "nonpublic" schools (*Wheeler v. Barrera*, 417 U.S. 402, 422-423 and n. 18 (1974). It should be kept in mind, however, particularly in light of appellant's distortion of the Court's holding in *Wheeler*, that the Court "intimated no view as to the Establish Clause effect of any program", 417 U.S. at 416.

three of the five counties within, or boroughs of, New York City – New York [Manhattan], the Bronx and Richmond [Staten Island]), and also in the previously mentioned affidavit of Reverend Vincent D. Breen, the Superintendent of Education of the Roman Catholic Diocese of Brooklyn (which includes the other two counties or boroughs of New York City, Kings [Brooklyn] and Queens) (JA 251-286).

Both prelates acknowledge that the schools under their jurisdiction are "religiously motivated" (JA 257, 275). They find "unobjectionable" the statement that those schools are "an integral part of the religious mission of the church" (JA 256). The general policies and goals of the schools are set at the diocesan level (JA 257, 275). The religious education provided reflects "a concern that students receive, in their normal educational setting an exposure to the teachings of the Roman Catholic Church and Christianity in general" (JA 259), and that "students be aware of Catholic values and examine those values critically" (JA 261). The school authorities insist that instruction in religion be a part of the regular school day (JA 272).

First preference for available places in the parochial schools participating in the New York City program is given to Catholic children (JA 262). In the schools in Manhattan, Bronx and Staten Island participating in the program, approximately 85.3% of the students are Catholic (*Id.*), and in the schools in Brooklyn and Queens, approximately 92.6% are Catholic (JA 278).

Although the teachers in the parochial schools under consideration are not required to be Catholic, they must, as a condition of hiring, agree "to cooperate with the policies of the school, the religious education value program and the general Catholic atmosphere of respect for each other, for learning and for God" (JA 263). In the Catholic high schools in the Archdiocese of New York, the only schools for which the pertinent statistics appear to be available, approximately 94.5% of the lay teachers are Catholic, and that figure does not take into account the members of the clergy who are teachers (JA 264).

The emphasis or focus in the religious education classes in the schools under consideration is on the teachings of Christianity as the Roman Catholic Church understands them (JA 264, 283).

Participation in these classes by all students is mandatory (JA 265, 282).

There are religious observances and exercises during the regular school day in "most" of the schools (JA 267, 284-285). *Attendance in these activities by all students is also mandatory* (*Id.*). Participation, as opposed to attendance, in some aspects of those activities, however, is forbidden to the non-Catholic students (*Id.*).

Even in secular courses which touch upon morals and values, the teachers "are encouraged to expose students to the moral and value dimension of the subject matter within a Christian framework" (JA 265).

(b) *The Alleged Alternatives*

Before settling on the contours of the present plan of operation of the New York City program with respect to extending the benefits of the program to church school students, the New York City Board of Education claims to have tried, for unspecified periods of time and in unspecified areas, certain alternatives.[3] One was to provide Title I courses for church school students on the premises of public schools, after regular school hours (JA 63). A second was to provide Title I courses for church schools students on the premises of their own schools, also after regular school hours (*Id.*). Both are claimed to have resulted in poor attendance and educational results (JA 64).

A third alternative, admittedly not tried, would have been to provide courses for church school students on the premises of public schools during *regular* school hours. This alternative, it is claimed, was not tried because it might have raised "serious questions" under the New York State Constitution (JA 64). The nature of those questions, however, was never specified by the appellant Chancellor or by any of the other appellants in any

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[3] Appellees believe that the claimed search for, or unavailability of, alternatives is irrelevant, or at least immaterial, to the constitutional issue in this case (see Plaintiffs' Counterstatement of Material Facts Not in Dispute [JA 77]; see also, the opinion of the Court of Appeals [J.S. App., 53a]. It is also for financial reasons, of no practical consequence with respect to the number of economically and educationally deprived students to whom the New York City program is able to extend the benefits of the program.

documentary or testimonial evidence in this case, nor was any explanation offered by any appellant as to why this alternative was not tested in the New York Courts.*

A fourth alternative, also not tried, would have been to provide Title I courses for church school students on "neutral" premises during regular school hours.

If any one of the three alternatives for providing Title I courses to church school students *off* the premises of their schools had been tried, the benefits of the New York City program would necessarily have been extended to those students at their request, or the request of their parents and far more directly (i.e., with far less, if any, substantial intervention or participation by church school officials) than under the present plan.

(c) *The Present Plan of Operation*

Under the present plan, the benefits of the New York City program are extended to church school students on a school-by-school basis, and the selection of the individual students who participate in the program within each church school is in major part made by the church school teachers and principal.

One, but by no means the only, reason for this aspect of the program is a lack of funds which makes it impossible to provide Title I services in all schools, or to all eligible students in those schools in which services are provided. In the school year 1981-82, the last school year for which statistics were available at the time this case was before the District Court, approximately 40,000 students attending church schools in New York City were eligible to participate in the City's Title I program (JA 38). This was 13.2% of the total number of eligible students in all of the schools,

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* Especially in light of the opinion and determination of the Court of Appeals in this case, it would seem that any questions arising under the New York Constitution could hardly have been more "serious" than those arising under the Establishment Clause of the Federal Constitution. It is also not a little inconsistent for appellants to claim that the provision of Title I courses to church school students on the premises of public schools, during regular school hours, raises a question under the State Constitution, while insisting that the present formulation of the New York City program provides courses to church school students in Title I classrooms that are each, allegedly, a veritable "[public] school within a [church] school"!

public or otherwise, in the City (approximately 300,000) (*Id.*). Of the number attending church schools, however, only approximately 20,000 students, or approximately 50% of those eligible, were expected to be able actually to participate in the program (*Id.*)[5].

Because of inflation, moreover, with each passing year, the real (after-inflation) dollars available to the New York City program have been fewer, so that in 1981-82 they were able to provide only approximately 75% of the number of teachers that were in the program eight years before (JA 44).

In actual practice, therefore, neither the students who are eligible to participate in the New York City program nor their parents have any choice as to whether they will actually participate, and those who do so may hardly be said to receive the benefits of the program directly. First of all, they are able to participate only if the school they attend has enough eligible students and is in a location that makes it feasible for the New York City Board of Education to assign teachers and guidance personnel to that school (JA 43). Secondly, in the case of a church school, the program is extended to the eligible students in that school only if requested by the principal (JA 60-61). No request is or may be made by any student or parent (*Id.*)

Thirdly, although the eligibility of each student is established objectively (by residence and the results of standard performance tests [JA 41-42]), the eligible student's actual participation in the program is determined, from among all of the eligible students in the school, by the Title I teachers assigned to the school on the advice of the regular classroom teachers and, on many occasions, the school principals. In the case of a church school, this means that, in actual practice, in the final analysis,

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[5] Although the Chancellor submitted no comparable statistics for the eligible students attending public schools, the number of those students who did not participate in the New York City program in 1981-82 must have been well over *100,000*, based on the *per capita* formula for allocating the available Title I funds used by the New York City Board of Education. The formula results in the allocation of funds for services to be provided to students in church schools according to the ratio of such students to all eligible students, whether in public or church schools (JA 43). The particular significance on these statistics is explained below.

the student's participation is in major part determined by the church school teachers and principals (JA 237-50 [the cited pages of the Joint Appendix contain pertinent excerpts from the Evaluation Reports on the New York City Board of Education for the school year 1979-80, the latest available at the time this case was before the District Court]).

(d) *The Courses*

The New York City program provides courses in remedial reading of two types: the first, for students in *all* grades of elementary and secondary school whose reading is at least one year below their grade level; and the second, for students in grades four to eight whose reading achievement is as much as five years below grade level (JA 45).

Courses in remedial mathematics are provided in *all* grades to students whose grasp of the subject is at least six months below grade level (*Id.*).

English as a second language is also taught in *all* grades to enable students who do not speak the language well enough (*Id.*), and here appellees quote from the Secretary's appeal brief, "to achieve the competency . . . necessary for them to participate effectively in regular instructional programs". Of course, the entire New York City program, in all its parts, has a similar basic purpose — to enable the students participating in the program to achieve learning levels that will enable them to keep up with their classmates in all of the courses taught in the schools participating in the program, which, of course, in the church schools include religious courses.

The clinical and guidance services in the New York City program are available only to students who participate in the other parts of the program, and are intended to help them by providing counseling to the students and their parents on special problems that might affect the students in their courses (JA 45-46).

(e) *The Teachers and Counselors*

The teachers and counselors in the New York City program are regular salaried employees of the New York City Board of Education and are similar in all professional respects to their fellow employees who teach and provide counseling services in or in

connection with the regular classroom courses in the City's public schools (JA 47-48). They are hired, paid and assigned to the church schools by the Board of Education (JA 47). Their assignment, however, is on a purely voluntary basis, ensuring that they all have a favorable approach to performing services in church schools (JA 48).

The applications for assignment contain no question concerning the applicants' religion, so that there is no basis for knowing to what extent the applicants who are accepted and assigned to church schools share the same faith as the schools to which they are assigned (JA 49)[6].

Although, as noted above, Title I personnel are assigned to the schools in which they perform services by New York City Board of Education officials, if they are assigned to church schools, they are assigned to rooms within those schools selected by the church school principals, and the hours of their classes and counseling conferences are fitted into the regular school schedule by the principals (JA 240).

Although Title I personnel do not necessarily teach or perform counseling services five days each week at the same school, or confine their services to one school, it is only reasonable to assume that finances, logistics and other administrative considerations dictate that, to the fullest extent possible, they perform their services in the same school as much as possible.[7]

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[6] Despite this admitted fact, appellants insist on stating that the relative handful of affidavits made by teachers in the program assigned to church schools, and submitted by the Chancellor to the District Court "demonstrate that the vast majority of [Title I] teachers work in nonpublic schools with religious affiliations different from their own" (S.Br. 49). Even if this unwarranted claim were true, it would not support the proposition that it reduces the potential for their inhibiting or even aiding the religion of the church schools, and it certainly would not support the proposition that it reduces the potential for administrative entanglement between Title I and church school personnel!

[7] The statistics furnished by the Chancellor and cited by appellants to support the allegation that Title I personnel are "itinerant" fall far short of doing so. The Chancellor has confined himself to offering the single statistic that "[d]uring the 1981-82 school year approximately 78 percent of all Title I teachers and other professionals spent less than five days a week at the same nonpublic school and worked in more than one nonpublic school"(C.Br. 8). This establishes that approximately 22% of the Title I personnel did in fact (cont. next page)

Although Title I teachers and counselors assigned to church schools are instructed that they are accountable to, and subject to the supervision of, only their Title I supervisors, and that they are solely responsible for virtually all aspects of the Title I program as administered in the church schools, they spend far less time with their Title I supervisors than with the church school teachers and principals, and they appear to give far less attention to their instructions than to the advice and recommendations of church school personnel (JA 237-250).[8]

The Title I teachers and counselors assigned to church schools confer regularly with both the church school teachers and principals concerning all aspects of the Title I program (JA 237-250). The Title I teachers decide with the church school teachers (and to a lesser extent with the church school principals) who from among the students eligible to participate in the program shall actually do so (JA 239, 240, 242, 244). The Title I personnel also accept referrals made to the clinical and guidance services by the church school teachers and principals (JA 237, 239, 245, 248, 249). Sometimes the Title I teachers and church school teachers jointly request clinical and guidance services (JA 245).

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[7] (cont.)spend all of their working time in the same church school. It makes no distinction between teachers and clinical and guidance personnel, and thereby suggests that the percentage would be substantially higher for teachers, since it is acknowledged that clinical and guidance personnel ordinarily spend only one or two days at a school (JA 58). In any event, "less than five days a week" may mean four days, or at least three, which hardly makes the teachers who perform services regularly during that number of days at the same school "itinerant". Lastly, the alleged fact that the Title I teacher or counselor is "itinerant" hardly decreases the potential for administrative entanglement between him or her and the church school official.

[8] The Title I personnel are instructed, among other things, that they are solely responsible for the selection from among the students eligible to participate in the Title I program those who will actually participate; that they are not to allow any Title I equipment, materials or supplies to be diverted for use in the regular instructional program of church schools; that they are not to engage in team-teaching or cooperative instructional activities with church school teachers; that they are not to become involved with the religious activities of the church schools, and that they are not to introduce any religious matter in their teaching (JA 50-51).

The Title I teachers "find out what the classroom [church school] teachers are teaching and/or coordinate lessons" (JA 240). They confer with the church school teachers to ascertain the specific needs and weaknesses of the Title I students in regular classroom studies in order to be able to help the students in those studies (JA 243). The public school teachers also help directly with regular classroom studies (JA 237). The Title I clinical and guidance counselors work with the church school teachers "in formulating comprehensive treatment plans" (JA 249). The Title I counselors and church school teachers use a "team approach" (JA 250).[9]

(f) *The Equipment, Materials and Supplies and The Classrooms and Other Service Areas*

To insure that the instructional equipment, materials and supplies used in the New York City program on the premises of church schools will not be used in or in connection with the religious courses of the schools, all items are labeled as the property of the New York City Board of Education as being for use in the Title program (JA 57). When they are not in such use, they are supposed to be locked in storage and filing cabinets, to the extent they will fit into such cabinets, and, as noted above, instructions to that effect are given to the Title I teacher*(Id.)*.

A further requirement or condition of extending the New York City program into a church school is that any and all rooms in that school used by Title I teachers and clinical and guidance counsellors in the performance of their services must be "free" of religious statues, symbols, pictures and artifacts (JA 58). This includes not only the classrooms set aside for courses taught by Title I teachers, but also the nurses' rooms and comparable

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[9] Appellants in their briefs studiously avoid referring to this constant, daily administrative contact between, and material assistance given to each other by, Title I personnel and church school personnel, especially that involving the church school principals, which is described in the Evaluation Reports as "an ongoing dialogue" (JA 238). Instead, appellants attempt to divert attention to what they call, and what may well be, the "routine" administrative contact between Title I officials and church school officials with respect to the processing of applications by the latter for Title I aid in their schools.

facilities used by the Title I counselors *(Id.)*.

(g) *The Supervision of Title I Personnel*

In the New York City program, one field supervisor is "ordinarily" responsible for supervising the work of 22 Title I teachers (JA 53). He can, therefore, do little more than to "attempt" to make "at least one unannounced visit to each teacher each month" *(Id.)*. The primary purpose of this occasional "unannounced" visit is to evaluate the teacher's performance as such – i.e., in the Title I classroom *(Id.)*.

With respect to the "unannounced" nature of these monthly visits, it should be noted that a Title I class consists of *ten or less* children in addition to the teacher (JA 51). The supervisor, therefore, may be "unannounced" before he walks through the door of the classroom, but he is hardly so thereafter when presumably, among other things, he is checking to see if the teacher is injecting any statements of a religious nature into the classroom instruction.[10]

Assuming the monthly visit of the supervisor to be a form of surveillance of the type calculated to uncover any violation by a Title I teacher or clinical or guidance counselor in matters within the purview of the Establishment Clause, there is not an iota of evidence in the record of this case of any such surveillance of any Title I teacher or counselor outside of a classroom or other Title I facility on (or off) the premises of a church school. In particular, there is no evidence in the record of any surveillance of any of the many regular conferences between and among Title I personnel and church school teachers and principals. There is also no evidence in the record of any form of interrogation of any Title I teacher or counselor, or any church school student, parent, teacher or principal, concerning any possible violation by a Title I teacher or counselor of his or her instructions in

[10] It is claimed that other governmental representatives make an unspecified number of "occasional" or "periodic" visits to Title I classrooms on the premises of church schools, although it is acknowledged that some of these sporadic visits are made "to monitor the extent to which the program goals...are being achieved" (JA 54).

Establishment Clause matters, or concerning any statement or conduct on the part of any church school teacher or principal that would tend to induce any such violation.

There is not the slightest reference in any of the Evaluation Reports for 1979-80 to any such matter, or any indication that any author of any such Report was concerned about it, or asked any question of any Title I personnel on the subject (JA 237-250). It also seems clear from the Reports that the authors did not interview or question any church school personnel about any matter, whether relating to the Establishment Clause or otherwise (*Id.*).

In 1984, as the result of an incident involving the Chancellor of the New York City Board of Education then in office, the New York City Department of Investigation undertook an examination of the Board of Education on a system-wide basis. Upon the conclusion of that examination, in September 1984, the Commission of the Department of Investigation issued a report stating that –

> "...The Board's mechanisms to prevent or uncover misfeasance or malfeasance are grossly inadequate. As it is presently constituted, the Board of Education's oversight components simply do not provide the kind of effective self-policing clearly needed." ("The Board of Education of the City of New York, A Review of Management Controls, Conclusions and Recommendations", [September, 1984], p. 2).

It is small wonder, therefore, that there has been no reported instance of a violation of the requirements of the New York City program which would constitute the clearest violations of the Establishment Clause – i.e., the requirement that no Title I teacher or counselor assigned to a church school become involved in the religious activities of that school, or inject religious matter into classroom instruction or counseling, and the corollary requirement that no church school principal or teacher try to exert pressure on a Title I teacher or counselor to ignore his instructions in such matters (JA 53, 55).[11]

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[11] As noted above, there seems to be substantial evidence in the Evaluation Reports of violations by Title I teachers and counselors of these instructions in related matters, such as the joint selection of students participating in (cont.)

(h) *The Success of the Program*

Nothing in the foregoing statement of facts is intended to indicate that the New York City program is not a good or successful program educationally, and, more specifically, that it has not contributed substantially to the educational needs of educationally-deprived children. The fact remains, and the statistics of record demonstrate, that it could continue to be as successful educationally, and to help as many educationally -deprived children, if it were redesigned to eliminate that portion of the program in operation on the premises of church schools.

As noted above, in the school year 1981-82, the last school year for which pertinent statistics are available in the record of this case, the federal funds available to the New York City program enabled the program to reach only approximately 20,000 of the approximately 40,000 eligible students attending church schools, and only the same percentage of the approximately 260,000 eligible students attending public schools (pp. 6-7, *supra*). If, therefore, the program were redesigned to eliminate that portion in operation in church schools, there would be more than enough eligible students attending public schools (who live in the same school districts and come from the same economic background as the eligible students attending the church schools) for whose benefit the funds used to finance the eliminated portion could be spent. In short, there would not be the slightest diminution in the total number of educationally deprived children whose needs the redesigned program would meet.

4. *The Procedural Background of this Case*[12]

Since its enactment in 1965, Title I, or programs instituted under the statute, have continually been under challenge in the

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(cont.)
the Title I program in conjuction with church school personnel, coordination of teaching activities with church school teachers, and "team" teaching and counseling. As will be noted below, moreover, the presence or absence of actual violations by individuals in the program is not a proper basis for determining the constitutionality of the program.

[12] This brief review of cases leading up to the present case is not set forth as legal argument, but merely to lay the factual groundwork for such argument.

federal courts. The statute and the New York City program were almost immediately challenged in *Flast* v. *Cohen*, 392 U.S. 83 (1968), as violating the Establishment Clause of the First Amendment by reason of the operation of the New York City program on the premises of church schools (J.S. App. 61a). The only issue resolved in that case, however, was the right of plaintiffs in the case to sue as taxpayers (Id.). After that issue was finally resolved by this Court, the case lay dormant while other cases of a similar nature worked their way up to the Court.

Title I was challenged again in *Wheeler* v. *Barrera*, *supra*, but when that case came before this Court in 1973, no program instituted under the statute was before the Court except a Missouri program which was under attack because it did *not* operate on the premises of church schools, and the issue of the constitutionality of the statute, or a program operating on such premises, was expressly left undecided by the Court until such time as a case involving such a program should come before it (417 U.S. at 426).

In the same term of the Court as *Wheeler*, however, a case involving a New Jersey statute, providing, among other things, for the use of state funds to provide teachers to conduct remedial education courses on the premises of church schools, came before this Court for review in *Public Funds for Public School* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *summarily aff'd*, 417 U.S. 961 (1974). In that case, the decision of a three-judge court finding the New Jersey statute unconstitutional was summarily affirmed by this Court.

Then, a case involving a Pennsylvania statute providing, among other things, for a program similar to that in *Marburger* came before this Court in *Meek* v. *Pittenger*, 421 U.S. 349 (1975). The Pennsylvania statute was found to be unconstitutional by the Court on the ground that it presented a potential for administrative entanglement between church and state, and on the additional ground of potential political entanglement (421 U.S. at 372).

Shortly after *Meek*, and based explicitly on this Court's determination in that case, a new case was instituted challenging Title I and the New York City program, *National Committee for Public Education and Religious Liberty (PEARL)* v. Harris, 489

F. Supp. 1248 (S.D.N.Y), *appeal dismissed for want of jurisdiction*, 449 U.S. 808 (1980). In *PEARL*, which was decided by a three-judge court in the Southern District of New York, the statute and program were held to be constitutional (J.S. App. 102a-103a), but the case never came before this Court because of the failure of the would-be appellants to file their appeal papers in timely fashion.

Even before PEARL was decided in the lower court, the present case was brought by a group of taxpayers in the Eastern District of New York. It, too, was explicitly based on *Meek*, an allegation concerning which appears in the complaint (JA 11). It was stayed by the District Curt while PEARL was pending (JA 14-15) and thereafter decided on the basis of the opinion of the three-judge court in PEARL (J.S. App., 55a-57a). The District Court was unanimously reversed by the Court of Appeals for the Second Circuit, which deemed itself bound by *Meek*, although it identified several other considerations calling for the same result (J.S. App. 53a). Now, in the final days of 1984, this case places squarely before the Court, for the first time since the enactment of Title I, the issue of the constitutionality of a plan or program instituted under the statute which provides teachers and counsellors to teach remedial education courses and perform support services on the premises of church schools.

SUMMARY OF ARGUMENT

A

Neither the national program set forth in Title I nor the New York City program is at stake in this case. Limiting that program to public schools will not prevent it from assisting as many students as it is now assisting. No such limitation will deprive any student attending a church school of any "equal opportunity". As any other child living in New York City, a student attending a church school has the equal right and opportunity to attend a public school of the City. There is no substantial question in this case concerning the Equal Protection Clause or the Free Exercise Clause. What is really at stake is the future of the Establishment Clause.

B

The brief language of the Establishment Clause may at times be difficult to apply, but there are precedents in the present case

that are closely in point. Appellants' resort to general principles of law and their quotation from opinions of this Court in inapposite cases should not be allowed to divert the Court's attention from those precedents. Appellants' reliance on the recent decisions of this Court in cases arising under the Establishment Clause is misplaced.

C

1. The constitutionality of the New York City program is best determined under the three-part test developed by this Court in recent years. The program has a secular legislative purpose. It has, however, the primary effect of both advancing and inhibiting religion, as well as the potential for excessive entanglement.

2. The program has the primary effect of inhibiting religion in that: (a) it requires all participating church schools to strip all religious symbols from the walls of all classrooms and other facilities before they may be used for Title I purposes; (b) it requires all participating students to accept instruction from public school teachers only; and (c) it inevitably tends to induce religious and sectarian organizations to become, or appear to become, less religious or sectarian in order to participate in the program.

3.a. The New York City program also has the primary effect of advancing religion. The cases in point strongly support that proposition. They hold that a government loan of instructional equipment and materials to a primary or secondary school with a predominantly sectarian purpose inevitably aids the religious function of the school, which cannot be sufficiently differentiated from the secular function. A distinction has been made in the case of textbooks, of a secular nature , loaned directly to the students of such a school, on the theory that the contents of a textbook are ascertainable in advance and, once they are ascertainted to be secular, the textbooks cannot aid the religious function of the school. On the other hand, it has been repeatedly stated that the contents of a teacher's instruction are not ascertainable in advance. Accordingly, there would seem to be no distinction between instructional equipment and materials and the instruction provided by a teacher, once placed in the environment of a sufficiently sectarian primary or secondary school.

b. A teacher presents an *a fortiori* case. He is at the core of the educational process. This is particularly so in the case of the

remedial teacher because of the degree of his students' dependence on the remedial instruction for use in all other subjects. Additionally, a teacher who is well respected or well liked improves the image of the school in which he teaches in the minds of his students. If he is a Title I teacher assigned to a church school, he lends the prestige of the government to the church school. This is the reverse of the procedure held impermissible in *McCollum v. Board of Education*, 33 U.S. 203 (1948), in which religious teachers were allowed to conduct classes on the premises of public schools, but the principle is the same insofar as the government may be said to be lending its prestige to a religious organization.

c. The Title I teacher is also of substantial aid to the regular classroom teacher and to the church school principal. The Title I teacher is effectively a member of the church school faculty. He also aids all of the regular classroom students who would be held back in their courses if their slowest classmates were not given remedial instruction in the Title I courses.

d. It is no answer to say that all of such aid would be available if the Title I program were conducted on the premises of public schools or on neutral sites. If that were so, there would be no excuse for the present program. Appellants themselves have pointed out that one of the substantial benefits derived from an on-premises program is the close working relationship that arises between the Title I teacher and the church school personnel, which is "impossible" to achieve in an "off-premises" program (J.S. App. 8a; see also, S. Br. 9). Also, in an "off-premises" program, a Title I teacher would not be in a position to improve the image of, or lend the prestige of government to, the church school.

e. The Roman Church parochial schools participating in the New York City program are sufficiently sectarian to bring into operation the rule set forth in paragraph 3a above. That conclusion is warranted by the affidavits of the prelates submitted by appellants to the District Court and by the description of the Roman Catholic parochial schools in the opinions of this Court in the prior cases in point. The affidavits show, among other things, that in the parochial schools in the New York City program, all students, no matter what their faith, must attend

religious classes and participate in religious exercises and observances during some part of every school day: The affidavits also show that over 85% of the students and the lay teachers are members of the Catholic faith.

f. It does not save the New York City program that benefits provided by the program are ultimately enjoyed by the participating students. That is so in any program. The aid in this program does not flow "directly" to the students. It is provided to the schools in the program on a school-by-school basis. It is provided to a church school only if and when requested by the principal of that school, and may not be requested by a student. Even when provided to a school, it is not necessarily given to all of the eligible students in the school, since there are not enough funds available to bring the benefits of the program to all eligible students. Selection of the participating students from among the eligible students is made by the Title I teacher in cooperation with the regular classroom teachers and the church school principals.

g. It also does not save the New York City program under the primary effect test that there is allegedly no evidence of constitutionally impermissible conduct by Title I teachers. Under the applicable rule (see para. 3a above), the advancement of religion derives from the ordinary services of the Title I teachers and counselors when rendered on the premises of the sectarian institution.

D

1. The New York City program has the potential for excessive entanglement. The potential for excessive entanglement is sufficient to condemn the program. Proof of actual entanglement is not necessary, and appellees do not have such burden in this case. The potential arises in a program of the type in question from the interaction of the Title I teachers and guidance counselors and not from any supervision. The classes, meetings, conferences and discussions in and outside the Title I classroom are virtually impossible to monitor under any system of surveillance that would enable the officials of the New York City program to be reasonably certain that there is substantially no constitutionally impermissible conduct. Any such system of surveillance would have to be so oppressive as to create more controversy and, therefore, even more entanglement.

2. There is no such system of surveillance in operation in the New York City program, and there never has been. There is only a limited amount of *supervision* consisting of sporadic visits by Title I supervisors to the Title I classrooms in church schools. The main purpose of these visits is not to check on any constitutionally impermissible conduct on the part of the Title I teacher, but rather on his competence as a remedial teacher. This is demonstrated by the annual Evaluation Reports concerning all parts of the program which do not make any reference to the subject of constitutionally impermissible conduct. They also do not indicate that the authors conduct any interviews or interrogation of any of the church school personnel. There is no indication in the record of any surveillance of the constant interaction between the Title I teachers and counselors and the church school teachers and principals.

3. The alleged lack of any constitutionally impermissible conduct in the operation of the New York City program can be explained by (a) the lack of any real system of surveillance, or (b) the lack of any willingness on the part of any participant in the program to compromise the program or the participant, and (c) the fact that, throughout the history of its existence, the program has been under attack in the courts, and all interested parties have been awaiting a determination of this Court concerning the program's constitutionality.

4. In addition to the potential for excessive administrative entanglement arising out of the interaction of Title I personnel and church school personnel, there is also a potential for excessive political entanglement. Appropriations under the Title I statute are voted upon annually by Congress. There has been little controversy concerning the amount or allocation of funds because the opponents of the national program take the position that it is being administered unconstitutionally to the extent that it permits any allocation of funds to any local education agencies for the purpose of providing teachers, counselors, equipment or materials to church schools or for the benefit of students attending those schools.

5. Even if there were no evidence of any actual constitutionally impermissible conduct or controversy in connection with the New York City program in the past, that would be no justification for disregarding the potential for such conduct and controversy in

the future. Within the last few years there has been a substantial change, not only in this country, but also throughout the world, in the amount and intensity of religious controversy.

E

There is no more reasonable line to be drawn in this case than the one already drawn by the Court of Appeals, which would prohibit any public funds to be used to provide publicly employed teachers or counselors to perform services on the premises of church schools. There is no reasonable distinction to be made between remedial and other secular education on a constitutional basis. There is also no such distinction to be made between "supplemental" and other secular education, as suggested by the Secretary. Under these circumstances, if the determination of the Court of Appeals is not affirmed, there is good reason to believe that the "genie will be out of the bottle."

ARGUMENT

THE NEW YORK CITY PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE EXTENT THAT IT USES FEDERAL FUNDS TO PROVIDE TEACHERS AND CLINICAL AND GUIDANCE PERSONNEL TO TEACH REMEDIAL EDUCATION COURSES AND TO PROVIDE SUPPORT SERVICES ON THE PREMISES OF CHURCH SCHOOLS TO THE STUDENTS ATTENDING THOSE SCHOOLS

A. What Is At Stake In This Case

It should be made clear what is and what is not at stake in this case. What is *not* at stake is the national education program here called "Title I." This is so procedurally as well as substantively. It was determined in the District Court, at the insistence of defendants and intervenors, now appellants, that the sole issue in this case should be whether or not the New York City program is constitutional. As a result, the determination of the Court of Appeals is confined to a declaration that the program is unconstitutional, and the Court of Appeals has offered appellants the opportunity to revise the program and to continue it in operation (J.S. App. 54a).

If this Court affirms the decision of the Court of Appeals, therefore, this Court need not strike down the statute, or terminate the New York City program, or even reduce the number of students participating in the program. As noted above in the counterstatement of the case, if the funds available to the program are not used for the benefit of students attending church schools, they can be put to full use for the benefit of an equal number of students attending public schools in the same areas.[13]

That transfer of benefits does not deny "equal opportunity" to the students attending church schools. In *Everson v. Board of Education*, 330 U.S. 1 (1947), Mr. Justice Black, speaking for a majority of the Court, which upheld New Jersey's right to provide free transportation to such students, made it clear that the Court did "not mean to intimate that a state could not provide transportation *only to public schools*" (330 U.S. at 17, appellees' emphasis). Mr. Justice Rutledge, in his dissent, pointed out that if a state did so, it would not discriminate against students attending private schools in a constitutional sense because - "[t]he child attending the private school has the same right as any other to attend public school (330 U.S. at 58).[14]

The existence of that right, moreover, distinguishes this case from *Brown v. Board of Education*, 347 U.S. 483 (1954). In that case, black students who had chosen to exercise the right were held to have been deprived of equal opportunity, or, more precisely, equal protection of the laws, because the separate *public* schools they were forced to attend were not equal in nature to the public schools that white students were allowed to attend.

In any event, any argument based on deprivation of equal opportunity in a case of this type has been rejected by this Court:

> "The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution. Having

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[13] See p. 14, *supra*

[14] Mr. Justice Jackson, dissenting, noted that – "The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them" (330 U.S. at 221).

> held that tuition reimbursements violate the Establishment Clause, nothing in the Equal Protection Clause will suffice to revive that program" — (*Sloan v. Lemon*, 413 U.S. 825, 834 [1973]).

The same applies to any argument based on the Free Exercise Clause:

> "It is true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clause,...and that it may often not be possible to promote the former without offending the latter" (*Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 [1973]).

What is really at stake in this case, therefore, is the future of the Establishment Clause.

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools" (Rutledge, J., dissenting in *Everson*, 330 U.S. at 63).

In the present case, in the practice of providing public funds for public school teachers to teach in church schools, we are in the presence of the second of those great drives, in high gear.

B. Some Further Preliminary Observations

Appellees are not unaware that, as a general proposition, the brief language of the Establishment Clause may at times be difficult to apply. On the issue now before this Court, however, there are a substantial number of precedents, close in point, that can be utilized as guidelines, cases in which public funds were used, or proposed to be used, to provide textbooks, instructional equipment and materials, and even teachers and counselors, to church schools or directly to students attending them. It was those precedents by which the Court of Appeals adjudged itself to be bound (J.S. App. 53a).

Appellants' attempt to denigrate reference to such precedents as if it were a blind resort to "fixed, *per se* rules", their own reliance on broad, general concepts of "neutrality" and "accomodation" and their snatching of bits and pieces out of the context of opinions of this Court in inapposite cases strongly suggest that they hope to persuade the Court to disregard the precedents. Appellants also apparently see, or think they see, in the most recent decisions of the Court a tendency in that direction. Appellees prefer to believe that at least two of those case are *sui generis*, and the third, although it relates indirectly to the matter of government aid to church schools, has little or nothing to do with aid at the core of the educational process of those schools.

Appellees refer to *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), and *Mueller v. Allen*, 103 S. Ct. 3062 (1983). The precise issues in those cases are worth noting in order to demonstrate how distant they are from those in the case at hand. In *Lynch*, the issue concerned a Christmas display, including a creche, in a public square, which had been sponsored by a municipality and a retail merchants' association. In *Marsh*, the question was the propriety of the practice of opening sessions of a state legislature with an invocation by a minister; in *Mueller*, the propriety of an income tax deduction for expenditures incurred by taxpayers in connection with the education of their children at public or private schools.

As noted, *Lynch* and *Marsh* have nothing at all to do with the use of public funds to aid church schools or their students. Both are explainable by the reluctance of a majority of the Court to invalidate well-established national traditions, one dating back to the First Congress. *Marsh* was decided in major part on the basis of a practice adopted in the First Congress, and the decision in that case virtually stands as an exception to the Establishment Clause (103 S.Ct. at 3333-3334).

As also noted, *Mueller*, the tuition tax deduction case, does relate to government aid to the parents of students attending church schools, but it is far removed from the use of government funds to provide teachers in those schools. It will be discussed in more detail below.

C. The New York City Program Has the Primary Effect of Both Advancing and Inhibiting Religion

Appellees assume, as apparently appellants also do, that, particularly in this type of case, this Court will apply the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971):

> "First the statute [or plan, program or practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, [it] must not foster an excessive government entanglement with religion."

The Court has not sustained any statute, plan, program or practice that has failed to pass each part of this test, except in *Mueller, supra*, where, as noted above, it virtually carved out an exception to the Establishment Clause.

Appellees do not challenge the fact that the New York City program has a secular purpose. We vigorously challenge, however, its constitutionality under the remaining two parts of the three-part test.

In this case, the Court of Appeals declined to pass on the validity of the New York City program under the primary effect test because, in its opinion, the program was clearly invalid under the entanglement test (J.S. App. 47a-48a). It suggested, however, that "[a] fair case could ... be made, on the record before us that government funding of the City's Title I program constitutes a direct and substantial advancement of religious activity..."(Id.). Appellees respectfully submit that the use of the word "fair" is an understatement, and that, as James Madison long ago foresaw, government intervention into the sphere of religion can at the same time - and in this case does - inhibit as well as advance religion (Madison, Memorial and Remonstrance, Par. 6. The "Remonstrance" is set forth in full in the appendix to Mr. Justice Rutledge's dissenting opinion in *Everson, supra*, [330 U.S. at 63-72]).

(1.)*The New York City Program Has the Primary Effect of Inhibiting Religion*

It is a prerequisite of the program in question that every room in a church school in which a Title I teacher or counselor is to

perform services must be stripped of all religious statues, pictures, symbols or artifacts that ordinarily adorn its walls or other parts (JA 58).

If it could not be presumed that religious symbols serve a substantial purpose in the Roman Catholic religion, the requirement of the New York City program with respect to such symbols would be proof enough. The requirement, moreover, clearly defeats that religious purpose, and thereby inhibits religion.

It is also a precondition of the New York City program that the instruction and support services provided under the program may be provided only by Title I teachers and counselors, who are public school teachers and public education employees. Yet it is well established by this Court that –

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children *by forcing them to accept instruction from public school teachers only" (Pierce v. Society of Sisters*, 268 U.S. 510, 530 [1925]; appellees' emphasis).[15]

The requirement that Title I courses must be taught by public school teachers, especially when coupled with the condition that the public school teachers must not inject any religious matter into their instruction, also deprives students attending church schools from having the benefit in Title I courses of any religious

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[15] It is ironic that appellants argue, on the strength of *Pierce v. Society of Sisters, supra*, that invalidation of the New York City program will allegedly violate the Free Exercise Clause, on the theory that it will place a burden on the exercise by students attending church schools of their constitutional right to do so – i.e., it will require them to forego instruction in the remedial courses provided by the New York City program unless they attend public schools. As noted above, this argument has been rejected (pp. 23-24, *supra*). Yet appellants fail to recognize that the main condition imposed by the program they seek to save imposes the same burden, in only a somewhat lesser degree – i.e., it requires students attending church schools for the purpose of receiving instruction from church school teachers under the administration of church school authorities to forego instruction in the remedial courses provided by the New York City program unless they accept instruction in those courses from public school teachers supervised by public school authorities (and, if we are to believe appellants, "in a [public] school within a [church] school!)

exercises, observances, instruction or comments that their "regular classroom" (church school) teachers are free to engage in, and undoubtedly do engage in, during their courses.[16]

As Mr. Justice Brennan noted in his concurring opinion in *Early v. DiCenso*, 403 U.S. 602 (1971), the record in that case disclosed that one of the church school teachers receiving a salary supplement for teaching secular courses under the Rhode Island statute invalidated in that case had, because of the requirements of the Rhode Island Constitution, given up the practice of saying a prayer in each of his classes (403 U.S. at 650). Mr. Justice Brennan described that evidence as "a concrete testimonial to the self-censorship that inevitably acccompanies state regulation of delicate First Amendment freedoms" *(Id.)*. The only difficulty appellees have with the Justice's comment is the reference to the censorship as being *"self-censorship", when it was in fact mandated by the Rhode Island Constitution (and is, in the present case, mandated by the New York City program).*

There remains the most serious way in which the New York City program inhibits religion. It apparently arises from the success church-connected colleges and universities have had in defeating Establishment Clause challenges to federal grants or loans in their favor on the strength of the argument that they are not "pervasively sectarian" (see, particularly, *Hunt v. McNair*, 413 U.S. 734 [1973]).

On the basis of that argument, appellants in this case set out to prove, through, among others, the chief officials of the Roman Catholic parochial school system in New York City that the schools in that system participating in the New York City program are not "pervasively sectarian" (JA 251-286). The District Court, by adopting the opinion of the three-judge court in *PEARL v. Harris, supra*, agreed (J.S. App. 87a-88a). The Court

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[16] It should be remembered that over 90 % of the lay teachers in the Catholic parochial schools in this case appear to be Catholic, and that this percentage does not take into account the *clerical* teachers whose existence appellants acknowledge only by their reference to lay teachers as such, and whose numbers were not offered at all, although surely a matter of diocesan record.

of Appeals, looking at the same record (all based on documentary, as opposed to testimonial, evidence) came to the conclusion that the schools in question were at least sufficiently sectarian to make their inclusion in the program in question a violation of the Establishment Clause (J.S. App. 44a-50a).

Elsewhere, appellees will argue that the Court of Appeals' conclusion was eminently correct (*infra*, pp. 38-40). The point made here is that it is an inevitable tendency, in cases of this type, for church schools desirous of receiving government financial assistance, directly or indirectly, to make themselves, or make themselves appear to be (which has the same effect, though to a lesser degree), less sectarian — i.e., less religious — than they would otherwise be.

As noted above, that tendency, resulting from a dependence of the church on the state, in any form, financial or otherwise, was a concern of Madison. As noted by Mr. Justice Brennan, it has also been the concern of many devout men:

> "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil policy, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government. It has rightly been said of the history of the Establishment Clause that 'our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism of a Roger Williams' " (Brennan J., concurring in *Schempp*, 374 U.S. at 259-260).

It is difficult to conjure up a better example of the tendency towards secularization resulting from dependence on government than the process that appears to be at work in cases of the present type.

2. *The New York City Program Has the Primary Effect of Advancing Religion*

A brief review of the pertinent cases is necessary to show the precedents in support of this point, the line that has emerged between the permissible and impermissible forms of aid, the basis for the line, and appellants' misunderstanding of that basis.

In *Everson*, *supra*, the Court debated the issue of free public transportation for students attending church schools, as well as public schools, in terms of whether or not the free transportation provided church school students had the primary effect of advancing religion. As has been often noted since, the bare majority that saw the free bus fares as not advancing religion recognized them as "approach[ing] the verge" of the state's constitutional power (330 U.S. at 16; see also, *Committee for Public Education v. Nyquist*, 413 U.S. 756 [1973]).

Except for the determination of the Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), decided over 20 years later, and perhaps even despite *Allen*, the description of *Everson* remains substantially accurate today, at least in the field of primary and secondary education. *Allen*, of course, permitted public funds to be used to lend free textbooks, of a secular nature, directly to church school students, as well as to public school students. The theory, however accurate or inaccurate, behind *Allen* was "that the content of textbooks can be ascertained in advance and [once ascertained] cannot be diverted to sectarian uses" (*Wolman v. Walter*, 433 U.S. 229, 251, n.18 [1977]). As will be seen, that theory sets secular textbooks apart from teachers (unascertainable in advance and divertible) and from instructional equipment and materials (neutral, but divertible). It also places the last two items in essentially the same category (divertible) and is an important element in appellees' position under the primary effect test.

Allen also stands for the proposition that government aid to church schools is less likely to aid religion if it flows directly to the students of the schools rather than to the schools themselves (392 U.S. at 243-24).

As noted above, the three-part test was formulated in *Lemon*, *supra*, which came before this Court in 1971, and in which the government aid at issue involved teachers. To be sure they were church school teachers, and the aid was not in the form of their assignment, but in the form of salary supplements paid to the teachers (as in *Early v. DiCenso*, 403 U.S. 602 (1971]) or reimbursements for teachers' salaries paid to the church schools (as in *Lemon*). The permissibility of the aid, moreover, was not determined under the primary effect test, but only under the entanglement test. Nonetheless, a critical determination for the

purposes of the primary effect test would seem to have been made in the subsequently oft-repeated conclusion, differentiating textbooks from teachers that –

> "[in] terms of potential for involving some aspect of faith or morals in secular subjects, *a textbook's context is ascertainable, but a teacher's handling of a subject is not*" (403 U.S., at 617, repeated in *Levitt v. Committee for Public Education*, 413 U.S. 472, 481 [1973] and also in *Committee for Public Education v. Regan*, 44 U.S. 646, 650 [1980]; appellees' emphasis).

As noted above, this theory places teachers in a quite different category from secular textbooks.

Although, *Tilton v. Richardson*, 403 U.S. 672 (1972), was decided on the same day as *Lemon*, appellees pass over it, as we also pass over *Hunt, supra*, and *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), on the premise that all three cases involved colleges and universities, rather than the primary and secondary schools under consideration in the present case, and the Court has clearly fashioned different rules regarding aid to institutions of higher learning.

In *Committee for Public Education v. Nyquist*, 413 U.S. 734 (1973), the Court did not go beyond *Allen*, or, for that matter, *Everson*, in striking down three programs under the primary effect test: (1) annual grants to church schools, on a per student basis, for maintenance and repair of buildings to ensure the students' health and safety; (2) reimbursements to parents of children attending church schools, and (3) tax deductions for such parents. In *Nyquist*, Mr. Justice Powell, for the majority, described the "channel" through which some forms of aid might trickle to the secular side of a church school, without being deemed direct aid to the sectarian, as "a narrow one" (413 U.S. at 775).

On the same day as *Nyquist*, the court struck down another tuition reimbursement scheme in *Sloan v. Lemon, supra*, and also a New York program for the reimbursement of church schools for certain costs of administering tests "mandated" by the State, but prepared by the church schools – *Levitt, supra*, (*Levitt* I). As indicated above, it was in *Levitt* I that textbooks were contrasted with teachers. It surfaced in *Levitt* I because the tests involved in that case were "teacher-prepared", rather than standardized, and it was felt by all of the Justices, except Mr. Justice

White, that such involvement required the program of reimbursements for administering the tests to be deemed impermissible under the entanglement test. Subsequently, when that element was removed and the issue related to reimbursements for administering standardized tests, the reimbursements were deemed unobjectionable. *Wolman v. Walter*, 433 U.S. 229 (1977), and *Regan*, *supra*.

At this point, appellants pass over *Wheeler*, *supra*, already discussed, where this Court held it would decide the constitutionality of Title I when a plan had been formulated under the statute and had come before the Court.

In *Marburger*, *supra*, decided in 1974, the issue of government aid to church schools involving teachers came before this Court once again, actually, in this instance, in substantially the same form as in the present case – the assignment of teachers, employed and supervised by local, public school boards, to church schools for the purpose of teaching remedial courses. The aid was provided pursuant to a New Jersey statute which was held unconstitutional under the entanglement test. The District Court, however, repeated the characterization of the contents of a teacher's instruction made by this Court in *Allen*, *Lemon* and *Levitt*, although without any comparison in this instance to textbooks – "[a] teacher's instruction may vary in content or emphasis and is not entirely predictable..." (358 F. Supp. at 40). This Court affirmed summarily (417 U.S. 961).

Thus, *Marburger* once again distinguishes teachers from secular textbooks, without making an explicit comparison.

In *Marburger*, aid in the form of instructional equipment and materials was also found by the District Court to be impermissible, but those findings were also based on the entanglement test.

Meek, *supra*, in 1975, brought to this Court for consideration substantially the same forms of government aid to church schools as those in *Marburger*, this time provided under an Ohio statute: (1) loans of secular textbooks to church school students; (2) the provision of instructional equipment and materials to church schools; and (3) the assignment of teachers and counsellors, employed and supervised by local, public educational agencies,

directly to church school students for remedial instruction and counseling on church school premises.

The Court declared the loan of textbooks permissible on the strength of *Allen* (421 U.S. at 362). Its conclusion with respect to the loan of instructional equipment was that it is impermissible under the primary effect test, but the conclusion was based on two grounds: (1)the fact that the loans were made directly to the church schools, and (2) the nature of those schools, which was the critical factor:

> "The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman*, 403 U.S., at 616-617. *Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.* '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. *Within the institution, the two are inextricably intertwined.*' For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity" (421 U.S. at 366; appellees' emphasis)

Thus, as noted above, the "intertwined" secular and religious functions of the church schools were fatal to the aid in the form of the instructional equipment and materials, even though the latter were "neutral."

The Court then found that the assignment of teachers and counselors, although directly to the church school students, was invalid under the entanglement test, expressly putting aside the question of whether they were also invalid under the primary effect test (421 U.S. at 369).

In *Wolman, supra*, a new Ohio statute, "obviously an attempt to conform to the teachings" of *Meek* (see 433 U.S. at 233), made the instructional equipment and materials *available directly to church school students* in the form of a loan, as in the case of the textbooks. This Court, however, once again found the aid to be impermissible, this time solely on the second ground set forth in the majority opinion in *Meek*. As stated in the majority opinion in *Wolman*, despite the new form of the aid, directly to the students –

> "The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. *In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the school*" (433 U.S. at 250).

Under *Wolman*, therefore, it is clear that aid is impermissible, as having the primary effect of advancing religion, when it places such items as instructional equipment and materials on the premises of church schools, the religious and secular functions of which institutions are "intertwined". And this is so regardless of whether the aid is granted or loaned to the church schools or to the students of those schools.

The Ohio statute in *Wolman* also provided aid to students attending church schools in the form of the services of diagnosticians and therapists. Appellees will defer consideration of those aspects of the statute until discussion of the entanglement test which appears below.

Lastly, in *Mueller, supra*, aid in the form of tax deductions to parents for expenditures on account of the education of their children once again came before the Court, as it had in *Nyquist, supra*. On this occasion, however, a majority of the Court distinguished the Minnesota statute in Mueller from the New York statute in *Nyquist* on the ground that the provisions in the Minnesota statute were "parts of a genuine system of tax laws" (rather than a direct tuition reimbursement) and theoretically available to all parents whether their children attended public or private schools. Mr. Justice Rehnquist, for the majority, commented that:

> "The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated

> financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case" (104 S. Ct. at 3069).

It is at least clear that the aid in *Mueller* is far removed from the educational process. The aid in the present case is at the center of it.

From *Everson* to *Mueller*, therefore, the only forms of government aid to church schools at the primary and secondary level, or to their students directly, that have been held to be permissible are: (1) free bus fares for the students; (2) the loan to the students of secular textbooks; (3) the reimbursement to the church schools of expenses incurred in performing specified "mandated" services such as administering and reporting on standardized tests on secular subjects; and (4) the provision to the students of diagnostic health services on the premises of the church schools, and of therapeutic services *off* those premises.

Even more critical are the forms of aid that have been declared impermissible by this Court, particularly instructional equipment and materials. No reasonable distinction in terms of permissibility can be drawn between those items and instruction and counseling by teachers and counselors. *If instructional equipment and materials, once placed on the premises of church schools, must inevitably aid the religious aspects of education at those schools because of the intertwining of the religious and secular aspects, then the instruction and counseling given by teachers and counselors placed on the same premises would have the same or much greater effect.*

Actually, as the procedures employed in the New York City program demonstrate, there is possibly a way to ensure that instructional equipment and materials will not be used in aid of the religious function of the church school. They can (as when not in use in Title I classrooms for Title I purposes) be kept under lock and key. They are thus placed in the same category as secular textbooks. Teachers and guidance counselors, however, cannot be placed under lock and key.

In comparison to textbooks and instructional equipment and materials, the part that the teacher plays in the education process

is enormous. It may well be said that the teacher is education "personified", in the literal as well as the figurative sense. He or she is one half of the teacher-pupil relationship, which Mr. Justice Rutledge, in his dissent in *Everson* noted, is "[n]ow and always the core of the educational process" (330 U.S. at 48).

The teacher involved in the New York City program moreover, instructs on no esoteric subjects: rather, he or she furnishes the building blocks of all knowledge – reading and arithmetic and the English language. Perhaps more than any other teacher, the one who engages in remedial instruction is truly at the dead center of "the core of the educational process". Without such instruction there *is* no such process, for the child who cannot read, or read or speak the English language well enough, cannot properly study any other subject in the curriculum of the church school, including the courses in religion and those in which religious principles and morals are involved.

The teacher of grade and high-school years is more than one half of the educational process to the student: he is not only education "personified"; he is often the school "personified". If he is admired and respected by his students, that admiration and respect is transferred to the school in which he teaches. The Title I teacher also lends to the church school the prestige of the State. As has been noted by this Court in numerous Establishment Clause cases, when that prestige is placed behind religion, it does not merely influence young students; it has a coercive effect on them (*Engel v. Vitale*, 370 U.S. 421, 430-431 [1962]; *Abington School District v. Schempp, supra*,, 374 U.S. at 221 [1963]; Brennan, J., concurring in *Schempp*, 374 U.S. at 260).

In this respect, *McCollum v. Board of Education, supra*, and *Zorach v. Clauson*, 343 U.S. 306 (1952) are instructive. As Mr. Justice Brennan pointed out in his concurring opinion in *Schempp, supra* –

> "The deeper difference [between the two cases] was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the same position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not."

* * *

> ". . . the Constitution does not permit that prestige and capacity for influence of the religious teacher to be augmented by investiture of the symbols of authority at the command of the lay teacher for the enhancement of secular instruction" (374 U.S. at 263).

The situation in the present case is, in one way, the reverse of that in *McCollum* in that, here, the New York City program places the Title I teacher in a church school classroom in precisely the same position as the regular classroom teacher. The fact remains that "the prestige and capacity for influence of the religious teacher [read: church school]" is now "augmented by investiture of the symbols of authority at the command of the lay teacher for the enhancement of [religious] instruction."

The placement of the Title I teacher on the premises of the church school by no means aids that school only symbolically. As noted in the counterstatement of the case in this brief, the Title I teacher also aids the regular classroom teacher by helping the latter to understand the problems and the solutions to the problems of the Title I students, and the way to reintegrate the student into his or her regular course of study.

Given the nature of remedial instruction and the necessity for constant communication between the remedial and the regular classroom teacher, it may fairly be said that the two are closer together, at least in the educational process, than any two members of the church school faculty. In effect, therefore, the Title I teacher, at least the one who teaches three or more days on the premises of a church school, becomes a member of the church school faculty. He or she is thus not only at the center of the core of the teaching process as that process is reflected in the relationship between teacher and student, but also as it is reflected in the relationship between teacher and teacher and teacher and principal.

The Title I teacher also aids all of the regular classmates of the Title I students in the church school by enabling them to move ahead in their studies instead of being held back by the Title I student.

It is no answer to what has been said that the same would be true if the Title I teacher and guidance counselor were to

perform their services off the premises of the church school. Appellants have insisted, and they have fashioned an argument, on the proposition that such services are quantitatively and qualitatively different from those performed "on premises". This is so principally because of the close working relationship that develops between the Title I teacher and the regular classroom teacher (and church school principal) when the Title I teacher is "on premises."

If the Title I teacher, moreover, were to perform his services "off premises", whatever admiration and respect he might inspire in his church school students would hardly be transferred to the church school; nor would he lend the prestige of the state to the church school.

It is also no answer to the foregoing argument to say that the church schools in this case are not "pervasively sectarian," so that placing a teacher on the premises of such a school does not necessarily aid the religious function of the school because of the intertwining of that function with the secular. Appellants repeatedly refer to a 10-point profile which they insinuate this Court has adopted with respect to primary and secondary church schools. This Court, however, does not seem to have done so — certainly never in *Meek* or *Wolman* — and when appellants are done insinuating otherwise, they admit as much (I. Br. 36). There is no excuse for their distortion of the opinion of Mr. Justice Stewart in *Meek* in this respect. Thus, they state that his characterization of the parochial schools in that case was made "in the context of schools" that fitted the 10-point profile (*Id.*). The 10-point profile, however, appears only in that part of Mr. Justice Stewart's opinion in which he describes and quotes from the *complaint* in Meek, *without approval* (421 U.S. at 371-372).

The closest that Mr. Justice Stewart comes in his *Meek* opinion to setting forth a profile as the basis for the determination of the majority of the Court is when he notes that the "purpose of many of [the schools involved in the case] is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief." He then concludes that "[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole... *and*

inescapably results in the direct and substantial advancement of religious activity, ..." (421 U.S. at 366).[17]

This passage from Mr. Justice Stewart's opinion in *Meek* was quoted in *Wolman* by Mr. Justice Blackmun, on behalf of a majority of the Court, immediately before he announced the determination of the majority that the loan of instructional equipment and materials, even though made directly to the children attending the Roman Catholic parochial schools of Ohio, was impermissible *under the primary effect test* (433 U.S. at 249-250).

Actually, in *Wolman*, the parties had stipulated to a "profile" of those parochial schools that, if anything, shows them to be less sectarian than the parochial schools involved in the present case (433 U.S. at 234):

> "It was also stipulated that, if they were called, officials of representative Catholic schools would testify that such schools operate under the general supervision of the bishop of their diocese; that most principals are members of a religious order within the Catholic Church; that a little less than one-third of the teachers are members of such religious orders; that 'in all probability a majority of the teachers are members of the Catholic faith'; and that many of the rooms and hallways in these schools are decorated with a Christian symbol. *Id.*, at 30-33... Pupils who are not members of the Catholic faith are not required to attend religion classes or to participate in religious exercises or activities, and no teacher is required to teach religious doctrine as a part of the secular courses taught in the schools" (433 U.S. at 224)

As noted in the counterstatement of the case in this brief, the Roman Catholic parochial schools in this case more than fit the stipulation in *Wolman*. To begin with, they discriminate to a substantial extent in their admissions policy, giving first preference

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[17] At this point, the aid to which Mr. Justice Stewart is referring in *Meek* is the loan of instructional equipment and materials, but, as noted above, it is appellees' position that the same principle applies, *a fortiori*, to aid in the form of teachers and guidance counselors.

to Catholics in the parish. They also place restrictions on the appointment of faculty members, if only to choose those who are basically in sympathy with Catholic principles and moral values. As noted above, Reverend Monsignor Healy indicates that well over 90% of the lay teachers in the high schools of his diocese are Catholic, and that figure does not take into account the clerical teachers.

Most importantly of all, the officials of the parochial schools in this case require *all* students, no matter what their faith, to attend religious classes and to participate in religious exercises and observances, and they see to it that such exercises and observances take place on every school day.

Lastly, the parochial schools in this case are located in a state in the northeastern part of this country, many of them in well-populated cities, and a substantial number in the "inner cities" of those cities. Thus, they would appear to be little different from the Roman Catholic parochial schools of Pennsylvania and Ohio involved in *Meek* and *Wolman*. As the Court of Appeals pointed out in the present case—

> "It would be simply incredible, and the affidavits [of Reverend Monsignor John J. Healy and Reverend Vincent D. Breen] do not aver, that all, or almost all, [of] New York City's parochial schools receiving Title I aid have in Justice Brennan's words in *Lemon*, *supra*, abandoned the religious mission that is the only reason for the school's existence" (J.A. App. 48a).

As noted above, appellants are aware that the cases in which the concept behind the phrase "pervasively sectarian" was developed, *Tilton*, *Hunt* and *Roemer*, *supra*, especially the last named, suggest a profile that might, in some respects, be more sectarian than that of the parochial schools in this case, but, as also noted, the cited cases all related to colleges and universities, to which this Court has applied different standards than to primary and secondary schools in cases involving aid permissible under the primary effect test, standards which are substantially more lenient in allowing the aid, and, therefore, require a profile that is substantially more sectarian before aid will be declared impermissible. *Wolman*, moreover, was decided by this Court after *Tilton*, *Hunt* and *Roemer*.

Appellants also argue that the aid in this case is saved by the alleged fact that it flows *directly* to the students participating in the New York City program. This is simply not true. Appellees do not deny that the assignment of Title I teachers and counselors benefits the students in the program considerably, and, as does any educational aid, whether or not it comes through the students' school or directly to the students, the aid here ultimately *benefits* the participating students directly (along with others), but it hardly flows to them directly in the way that has been deemed to save other aid.

In this respect, of course, *Allen* is the leading case. It is clear, however, that the textbooks involved in *Allen* went directly to the students in a very real sense. First of all, they had to be requested by the students, although the request could be passed on by an official of their school (392 U.S. at 255). More importantly, on receipt, each book truly became the unique property — on a "loan" basis — of the student. It was his to read by himself and otherwise to use and control without having to share with anybody else.

Quite obviously, this is not so with respect to the Title I teacher, who is not, and may not be, requested by any student or group of students, and whose assignment, schedule and movements are never controlled by any student or group of students. Even his instruction is shared among all the students and not by any one. In this respect, he is much more like the instructional materials and equipment in *Wolman* than the textbook in *Allen*.

Even though, moreover, the Ohio statute that finally came before this Court in *Wolman* had been amended to provide that the materials and equipment should be loaned directly to the students, the amendment did not save the statute (433 U.S. at 250). Also, even though the Pennsylvania statute in *Meek* provided that the "auxiliary services", including the remedial and counseling services to be performed by public employees, should flow directly to the church school students, that did not save those services from being determined to be impermissible (421 U.S. at 367).

The tax deductions in *Mueller, supra,* are distinguishable from the Title I teachers in the present case. First of all, they are far removed from the educational process. Secondly, as Mr. Justice

Rehnquist noted, whether and to what extent those deductions are taken are matters completely within the control of the taxpayers. Lastly, the fact that they may be taken by parents of children attending public as well as private schools does not save the aid in this case because the latter aid is available on that same basis. In *Meek*, this Court would not sanction the aid provided by the Pennsylvania statute with respect to teachers or instructional materials and equipment, even though it construed the statute to be part of a legislative scheme to grant like aid to all students, whether they attended public, private or church schools (421 U.S. at 367-368), since other legislation or appropriations had previously provided the same aid to children attending public schools.

In sum, it seems clear on the basis of *Meek* and *Wolman*, and the reasoning of a majority of the court in each of those cases, concerning the impermissibility of the aid provided in those cases in the form of instructional equipment and materials, that the aid provided in the present case in the form of instruction by teachers and support services of clinical and guidance counselors is equally impermissible as having the primary effect of advancing religion.

Appellants' final argument against the applicability of the primary effect test in this case is based on the allegation that there is no proof of any deliberate constitutionally impermissible conduct on the part of the Title I teachers or counsellors in the New York City program. Appellees will deal with the accuracy of that allegation below. Here it is pertinent only to note that this Court in *Meek* and *Wolman* did not require any such proof in determining that government loans of instructional equipment and materials are invalid under the primary effect test, relying solely on the predominantly sectarian nature of the church schools and the intertwining of the religious and secular functions of those schools. If, however, appellees were to point to any particular conduct on the part of the Title I teachers or counselors, in connection with the primary effect test, it would be the establishment of their close working relationship with the regular classroom (church school) teachers and principals which inevitably aids the church school personnel, particularly the regular classroom teachers, in *all* of their courses, and, specifically, in reintegrating the Title I students into all of those courses.

D. The New York City Program Has the Potential For Excessive Entanglement

It will be necessary to review once again some of the cases in point, but here only insofar as they bear upon the entanglement test, and, particularly, the nature of that test, and the point at which it has been applied.

As noted above, in *Lemon* and *DiCenso, supra,* this Court applied only the entanglement test to strike down the Rhode Island and Pennsylvania statutes there before it, providing for salary supplements to, and reimbursements for, teachers employed by church schools.

The Court clearly did so on the face of the statutes, *i.e.*, the plans or programs formulated in the statutes (White, J., dissenting, 403 U.S. at 664). It saw in both plans or programs several potential evils - (1) the potential referred to above concerning the possibility of the teacher's injecting "some aspect of faith or morals in secular subjects" (403 U.S. at 616); (2) the potential of controversy between public education personnel and church school personnel; and (3) the potential of political controversy. The emphasis on potentials is clear and abundant:

> "But what has been recounted suggests the *potential* if not actual hazards of this form of state aid (403 U.S. at 618; appellees' emphasis).
>
> * * *
>
> "But the *potential* for impermissible fostering of religion is present (403 U.S. at 619; appellees' emphasis).
>
> * * *
>
> "The *potential* divisiveness of such conflict is a threat to the normal political process" (403 U.S. at 622).

The Court had evidence of the actual experience of the Rhode Island program, which it accepted as true, but which it rejected as a basis for determining the constitutionality of the program. Thus, both the majority and dissenting opinions alike note (1) that several teachers participating in the Rhode Island program had testified in the District Court to the effect that they had injected no religious matter into their secular course instruction (403 U.S. at 666-667); and (2) that the District Court had found

as fact that "concern for religious values did not inevitably or necessarily intrude into the content of secular subjects" (403 U.S. at 667).

The Court also noted that "[t]o ensure that no trespass occurs, the State has ... carefully conditioned its aid with pervasive restrictions" (403 U.S. at 619). The Court, however, refused to rely on those restrictions. It held that "[a] *comprehensive, discriminating and continuing* state surveillance will inevitably be required" which would itself "involve excessive and enduring entanglement between state and church" (403 U.S. at 619).

Marburger added two new elements. Under the New Jersey program there in question: (1) the teachers were no longer employees of the church schools and under the latter's supervision, but *employees of the local, public boards of education* and supervised by those boards; and (2) the instruction was remedial. Yet the three-judge court that struck down the program still found that the potential for fostering religion and for provoking administrative and political controversy (358 F. Supp. at 40-42). The Court also made its determination on the face of the New Jersey statute without benefit of any actual experience of the operation of the state program.

As noted above, this Court nevertheless affirmed the District Court's determination summarily.

Meek, therefore, was not the first case in which this Court was faced with public funding of publicly employed teachers giving remedial instruction on the premises of church schools. In any event, a majority of the Court reaffirmed all that was stated and held in the majority opinion in *Lemon, supra*. It particularly reaffirmed the statement that had appeared in the majority opinion in *Lemon*, and had been repeated in the District Court's opinion in *Marburger*, that "[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion. 403 U.S., at 619" (421 U.S. at 371; appellees' emphasis).

The majority expressly found and concluded:

> "The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially

> eliminate the need for continuing surveillance....But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained....The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present" (421 U.S. at 371-372).

Although there was "an evidentiary hearing" before a three-judge court in *Meek*, the Pennsylvania statute and program appear clearly to have been decided facially.

Although the Ohio program under consideration in *Wolman*, *supra*, provided aid to students attending church schools in the form of the services of diagnosticians and thereapists, the majority opinion in *Wolman* once again reaffirmed the determinations of the Court in *Marburger* and *Meek*. Under the Ohio program, the diagnosticians performed their services on the premises of the church schools (433 U.S. at 241), whereas the therapists performed services *off* the premises (433 U.S. at 244-245).

In holding that it was permissible for the program to provide for diagnosticians to perform their services "on premises", the majority of the Court drew a distinction between diagnostic services and teaching based on the fact that the former "have little or no educational content and are not closely associated with the educational mission of the nonpublic school....Second, the diagnostician has only limited contact with the child..." (433 U.S. at 244).

With respect to the therapists under the Ohio program, there was no issue with respect to their performing services "on premises", the only question being whether, if they performed their services at "neutral" publicly-owned locations (off the premises of public, as well as church schools) they should be allowed to attend exclusively to church school students on any one or more of such sites. The Court held that they could do so since "[t]he dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils" (433 U.S. 249).

It was the clear line drawn by *Marburger*, *Meek*, and *Wolman* that persuaded the Court of Appeals in the present case that it was bound to declare the New York City program unconstitutional (J.A. App. 53a). The same line was seen by the majority of the Court of Appeals in *Americans United for Separation of Church and State v. School District of the City of Grand Rapids*, 718 F.2d 1389 (6 Cir. 1983). As the majority said in response to the dissent: "It [the dissent] cites no instance (because there is none) where the Supreme Court has approved expanding public tax funds for teachers to teach *in parochial schools*" (718 F.2d at 1407; *emphasis in original*).

Appellants seek to find distinctions in the precedents where none exist, and, suspecting that there are none they ask the Court to overrule *Meek* (and presumably *Marburger*, *Wolman*, and much of the Court's reasoning in *Lemon*) (S. Br. 40, n. 32). Appellees will here answer their arguments not answered elsewhere.

1. It has already been noted in the counterstatement of the case at the beginning of this brief that appellants claim that no "entanglement" is possible in the New York City program because the relationship between public or government and religious authorities is limited and routine (S. Br. 33; I. Br. 43). As also noted, any such observation completely ignores the key personnel in the program, who are the Title I teachers and counselors and who have a close relationship with the church school students, teachers and principals. The *potential* for controversy is in that relationship, and, obviously, if it exists there, it will quickly spread to higher levels.

2. In the same vein, appellants argue that no entanglement is possible in the program because the only "supervision" is that of public school employees (the Title I teachers and counselors) by public school officials (the Title I supervisors, coordinators and higher officials) (I. Br. 44-45). This also ignores the close, daily communication between Title I teachers and counselors and the church school students, teachers and principals, and the fact that entanglement does not arise only out of "supervision" of one group by another, but also, and more likely, out of any interaction between two groups (421 U.S. at 372, n. 22)

In this respect, *Wolman*, cited by Intervenors, is completely inapposite. As noted above, the program in *Wolman* did not involve public school teachers performing services on the premises of church schools, in daily contact with church school personnel, but only diagnosticians who only occasionally visited the church schools, and therapists who performed their services "off premises".

3. Appellants' "school-within-a-school" theory is an obvious superficial attempt to conform to *Wolman* and proves too much. If it is impermissible to place a public school teacher on the premises of a church school, it is all the more impermissible to place an entire public school on such premises. In any event, the alleged "school-within-a-school" theory does not lessen the communication between Title I teachers and church school students, teachers and principals. It also leaves out the Title I counselors who perform their services in the church schools' nurse's room or comparable facility.[18]

4. Remaining is appellants' main argument, which is based on the alleged actual experience in the operation of the New York City program between the time it first went into operation and the time this case came before the District Court. In this particular argument, appellants seek to grab hold of their own bootstraps in order to throw themselves over the hurdle of the precedents.

Despite their culling of quotes from the opinion of the Court of Appeals, that opinion hardly finds that the New York City program involves active and extensive surveillance or that such surveillance has achieved its purpose. Rather, a close examination of the opinion under consideration will demonstrate that it actually credits the program with the only "surveillance" that is shown to exist on the record, which is no real "surveillance"

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[18] The short answer to appellants' persistent reference, usually in footnotes, to *Nebraska State Board of Education v. School District of Hartington*, 188 Neb. 1, 195 N.W.2d 161, *cert. denied*, 409 U.S. 921 (1972), is that it represents a unique, emergency situation; it was never decided by this court; and in any event it preceded *Meek*, in which Mr. Justice Brennan, who is quoted by appellants for his explanation of his vote against granting certiorari in *Hartington*, voted with the majority of the Court.

at all, but merely an "attempt" on the part of overworked Title I supervisors to visit each Title I teacher once a month. Thus, as the Court of Appeals noted when it specifically referred to the record on "surveillance" – "The visits of the Title I supervisors are sporadic and, while unannounced, are not unnoticed" (J. A. App. 39a).[19]

Those visits are the only "surveillance," and they are not even intended to be surveillance, but rather supervision for the purpose of evaluating the teacher's instruction from an educational viewpoint. As the Court of Appeals pointed out – "These visits do not disclose what goes on in the frequent contacts between the regular and the remedial teachers (or other professionals)" (J. S. App. 39a). More importantly, they do not, and *they cannot possibly*, disclose what goes on every day in the month between the Title I teachers and counselors and the church school students.

Appellees understand *impossibility*, when coupled with the injunction that the State must be reasonably *"certain"* that there is no impermissible fostering of religions, to be the key to the surveillance that Mr. Justice White has described as creating a "paradox". We take *Meek* to mean that, in the context of a program such as the one in question in this case, where the State places its employees on the premises of church schools, virtually no amount of surveillance will suffice to assure certainty, and, if attempted, is bound to produce the very controversy and entanglement that the State should have avoided in the first instance.

Appellants and those who constantly seek loopholes in the Establishment Clause, and in the efforts of this Court to maintain the full strength of that Clause, apparently have interpreted *Meek* to hold that, no matter what the danger or potential for impermissible conduct in any plan or program, it can be made to pass muster by building in the proper degree of surveillance or appearance of surveillance. As so many of such arguments, it proves too much, and would, if accepted, permit many, if not

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[19] Intervenors do not fully quote, and thereby distort, the concluding sentence of the same paragraph of the opinion (I. Br. 38; cf. J.S. App. 39a) At the end of its opinion, the Court of Appeals noted that "nothing in the record shows that surveillance under New York City's plan is significantly different from that contemplated by the Meek Court...."

most, of the programs, plans and practices this Court has struck down under the Establishment Clause.

Just as the "surveillance" conducted under the New York City program is a sham, so is the alleged absence of any impermissible conduct. Indeed, it is clear that the absence of the one can easily account for the absence of the other. As the Court of Appeals has pointed out, not one of the participants in the New York City program is apt to "turn himself or herself in", and the largest, most important, most impressionable group of participants in the plan, the students, undoubtedly would not be able to detect conduct that was impermissible under the Establishment Clause if carried on in their presence.

As noted in the counterstatement of the case, moreover, several other significant facts of record serve to account for the alleged absence of impermissible acts in the record. The first is the fact that during the entire period of time it has been in operation, the New York City program has been in the courts under attack as unconstitutional. That alone would tend to mute conduct and controversy on both sides. Secondly, there is *Meek* and the other precedents on which appellees more than reasonably relied, as witness the decisions of two Courts of Appeals. Appellees saw no need to encumber the record and to waste their slender resources on proof of specific acts when the precedents advised them that they need only prove the contours of a plan which demonstrated a judicially recognized potential sufficiently great to warrant rejection on its face.[20]

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[20]Appellees' position, adopted by the Court of Appeals, serves to answer appellants' argument that the Court reversed the burden of proof in this case. Such is not the fact. Appellees met that burden under *Meek* and the other precedents when they laid before the Court the contours of a plan which, on its face, created a sufficient potential for excessive entanglement. They did not even attempt to meet the burden that would have been imposed by appellants' theory – i.e., before a plan may be held to be invalid under the entanglement test, it must be shown to have actually generated controversy or constitutionally impermissible conduct. This being so, in much the same way as the Secretary has asked the Court to override *Meek* and the other precedents should the Government prove to have been wrong, appellees ask the Court to remand this case in order to give them an opportunity to develop a record on the true, actual experience of the New York City plan should they prove to have been wrong.

Up to this point, appellees have addressed themselves only to the question of potential administrative entanglement. There is, however, as great a danger of political entanglement. To date, as appellants argue, the appropriations allocated to the New York City program, as extended to church schools, have been relatively small – if $20,000,000 is small. If, however, the reasonable line drawn by the Court of Appeals is not maintained, the amount of government aid that can, and will undoubtedly, flow to the church schools for avowedly secular courses will be much larger; at least, the pressure to increase that flow will be much stronger, and it may reasonably be foreseen that it will generate more controversy, not only in Congress, but also in the State legislatures, than any previous controversy of that type in the history of this country.

So much for the potential, which, as noted, is what the precedents are based on. It should be noted once again that funds for the local Title I programs are raised by annual appropriations voted in Congress. Those appropriations, which have remained relatively small while this case has been working its way up to this Court, have in fact been regularly and vigorously opposed by many organizations (over 20 alone, united in the Committee for Public Education and Religious Liberty). As also noted above, however, that opposition has been confined to the constitutionality of Title I, and sharp controversy has been muted by the willingness of both sides to await the decision of this Court. If that decision permits appropriations to continue, without limitation as to church schools, there will clearly be much more vigorous opposition, especially as the amount of appropriations increase, and, as noted, the controversy spreads to State legislatures.

Appellees are not unaware of the statements in the most recent opinions of a majority of this Court in *Lynch* and *Mueller*, *supra*, to the effect that the question of political entanglement may only arise in cases where there are "direct financial subsidies paid to parochial schools or to teachers in parochial schools" (103 S. Ct. at 3071, n. 11.). The matter under consideration in neither of those cases, however, involved annual legislative appropriations, as does Title I. We submit, therefore, they are not proper vehicles for a precise determination between the situation

in which a legislative body determines the issue of appropriating funds to pay the salaries of teachers hired by church schools or teachers hired by local, public educational agencies to teach in church schools, at least from the point of view of political controversy and entanglement. On that basis, we respectfully submit that the issue has yet to be decided in a case of the present type, and that, if it is decided here, it should not be on the basis of the slight, entirely formal difference between programs, plans or practices having precisely the same ends.

In concluding, appellees note that appellants have, in all courts, insisted on the proposition that determinations in cases of this type necessarily call for the drawing of lines. Appellees submit that the only reasonable one has been drawn by the Court of Appeals, one which would prohibit government aid for the teaching of any secular courses in church schools. Actually, it is the line in *Wolman*. It should be held fast.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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